Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Final Reply Submission

Social, Community, Home Care and Disability Services Industry Award 2010 (AM2018/26)

26 February 2020

AM2018/26 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this reply submission in response to:

   (a) The directions issued by the Fair Work Commission (**Commission**) on 5 December 2019 (**Directions**);

   (b) The background paper issued by the Commission on 6 January 2020 (**Background Paper**);

   (c) Submissions filed on behalf of the Health Services Union (**HSU**), United Workers' Union (**UWU**) and Australian Services Union (**ASU**) (collectively, **Unions**), dated 10 February 2020;

   (d) Submissions filed by Australian Business Lawyers and Advisors (**ABLA**), dated 10 February 2020;

   (e) Submissions filed by National Disability Services (**NDS**), dated 7 February 2020; and

   (f) Submissions filed by the Australian Federation of Employers and Industries (**AFEI**), dated 11 February 2020;

   regarding the 4 yearly review of the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**).

2. All page numbers mentioned in this submission are by reference to the Court Book unless otherwise specified.

3. Ai Group continues to rely on its written submissions previously filed in respect of the various claims.

2. STATUS OF THE FINDINGS PROPOSED BY AI GROUP

4. The table below summarises our understanding as to whether the findings proposed by Ai Group in its submission of 18 November 2019 are contested by other interested parties. The findings are identified by reference to the paragraph numbers in that submission.

Para	Finding Sought	Contested / Not Contested
General issues		
6	Employees providing disability services in clients' homes perform a range of duties including assisting clients with showering, personal hygiene, meal preparation, taking medication, cleaning, laundry, taking them to public places such as shops or a café, other community engagement activities and taking them to medical appointments.	Not contested
7	Employers face a peak in demand for their services at certain times of the day, such as in the morning and in the evening.	Not contested
8	Enterprise bargaining between employers and employees covered by the Award is not common.	Contested by ABLA.
9	Where an enterprise agreement applies, it is uncommon for such an agreement to deliver terms and conditions that are significantly more beneficial to employees than those provided by the Award. This is at least in part due to the operation of the pricing caps imposed by the NDIS.	Partly contested by ABLA.
10	Employees are commonly required to work routinely with a particular client or multiple such clients over a period of time.	Not contested
11	Such an arrangement benefits the employee (because the employee gains a better understanding of the clients' needs), the employer (because the employee is able to perform their work more efficiently) and the client (because the client develops a rapport with the employee).	Contested by the Unions.
12	It is common for employees to be employed by and to be performing work for more than one employer covered by the Award.	Not contested
13	Some employees find personal satisfaction in undertaking work in the sectors covered by the Award.	Not contested

The Operation of the NDIS		
14	The hours of work of an employee engaged in the provision of disability services in a person's home are dictated by their employer's clients' needs and demands.	Contested by the Unions.
15	Demand for specific services from an employer fluctuates constantly due to changes to the number of their clients, their budgets, their choices of services, seasonal factors, holidays and medical or clinical factors.	Contested by the Unions.
16	The transition to the NDIS has been financially very challenging for some employers.	Not contested
17	The cost model underpinning the NDIS pricing arrangements does not make express provision for at least the entitlements listed at paragraph 17 (**Unaccounted labour Costs**).	Not contested
18	The component of the NDIS cost model attributed to 'overhead costs' is intended to cover labour costs associated with employees who are not delivering disability services (such as a CEO, managers, payroll staff and HR personnel); as well as capital expenditure.	Contested by the Unions.
19	The cost model does not expressly factor the Unaccounted Labour Costs into the setting of the component of the cost model attributed to overhead costs.	Contested by the Unions.
20	The cost model provides for a profit margin of 2%.	Not contested
21	The recently introduced Temporary Transfer Payment (**TTP**) will be paid to an employer in respect of a client's plan that is made from 1 July 2019 only if the client agrees to allow the employer to claim the TTP payment from the funding allocated to the client.	Not contested
Minimum Engagement Periods, Broken Shifts and Travel Time		
22	Broken shifts are commonly utilised by employers covered by the Award.	Partly challenged by AFEI.
23	Employees are commonly rostered to perform work for the same client on multiple occasions during the course of a day.	Not contested
24	The length of an engagement that forms part of a broken shift can vary from 15 minutes to 7 hours.	Not contested
25	Some full-time and part-time employees are required to work 30 minute engagements[1] and, in a smaller number of instances, 15 minute engagements.	Not contested
26	The number of "breaks" in a broken shift can vary from 1 – 5.	Not contested
27	Client cancellations sometimes result in a broken shift where the employer is unable to provide the employee with other work during the cancelled shift.	Contested by the Unions.

[1] Exhibit AIG1 (Staff roster of D. Fleming); Page 2917 (Statement of F. McDonald at FM-2); Page 2935 at paragraph 19 (Statement of W. Elrick); Page 2958 at paragraphs 21 – 22 (Statement of H. Waddell); Page 2962 at paragraph 12 (Statement of T. Thames); Page 2989 at paragraph 20 (Statement of S. Quinn); Pages 4613 – 4634 (Statement of T. Stewart at Annexure B) and Revised statement of R. Steiner at paragraph 15.

28	Broken shifts provide some employees with the flexibility that they desire.	Not contested
29	Many employees are not paid for time spent travelling to and from clients. This includes travelling between clients and travelling to the first client / from the last client.	Not contested
30	The period of time taken by an employee to travel to a client's place of residence is in some instances as little as 5 minutes.	Not contested
31	The period of time taken to travel to a client's place of residence can vary from one occasion to the next and be difficult to predict for reasons including traffic.	Contested by the Unions.
32	In some cases, employees travel directly from one client to the next.	Not contested
33	In other cases, employees do not travel directly from one client to the next.	Not contested
34	During a break in a broken shift, employees often undertake non-work-related activities, including spending time at home.	Contested by the Unions.
35	Some employers endeavour to prepare rosters in a way that maximises their employees' working time and / or minimises the time their employees spend travelling to and from their clients.	Contested by the Unions.
Overtime for Part-Time Employees for Work in Addition to Agreed Hours		
36	Some employers are unable to guarantee additional hours of work to part-time employees due to the operation of the NDIS.	Not contested
37	Some part-time employees want to work additional hours.	Not contested
38	The introduction of a requirement to pay a part-time employee at a higher rate of pay for additional hours of work would be a financial disincentive to offering additional hours of work to that employee and may result in an employer electing to instead give those additional hours of work to another employee.	Not contested
Roster Changes		
39	Changes to employees' rosters are commonly caused by client cancellations.	Not contested
40	Changes to employees' rosters are commonly caused by the absence of other employees of the employer.	Not contested
Uniforms and Clothing		
41	Employee concerns about inadequate uniforms are on occasion dealt with and resolved at the enterprise-level.	Not contested
42	Some employers provide protective clothing and gloves for employees to wear while working.	Contested by the Unions.
Telephones		
43	Some employers provide their employees with mobile phones.	Not contested
44	Mobile phones owned by employees and utilised for work purposes are also utilised by those employees for personal purposes including personal phone calls, text messages and internet usage.	Not contested

45	Some mobile phone plans are structured such that an employee does not incur any additional cost for work-related phone calls, text messages or internet usage.	Not contested; however, for completeness we note that our proposed finding was not identified at paragraph [343] of the Background Paper.
Remote Response		
46	Some employees undertake work-related activities while they are not at the workplace in circumstances where they are not required by their employer to perform such work.	Not contested
47	Some work-related activities are undertaken by employees while they are not at the workplace in as little as a "few minutes".	Contested by the Unions.

3. GENERAL FINDINGS ON THE EVIDENCE – RESPONSE TO THE UNIONS' SUBMISSIONS

Response to paragraph 155 of the Unions' submission

5. The Unions submit that they "do not embrace the characterisation of the practice [of an employee working routinely with a particular client] as constituting a "benefit" of employment for an employee".

6. The evidence demonstrates that by working routinely with a client, an employee gains a better understanding of the client's needs.[2] Although this is not a benefit *of employment*, it is clearly a benefit that enables the employee to perform their work more efficiently and with greater proficiency and ease.

Response to paragraph 156 of the Unions' submission

7. The Unions rely on "extensive evidence, in particular, that of Dr Stanford, as to the deleterious effects of the precarity of work in the sector on employee well-being and retention in the industry".

8. The Unions have not identified the specific parts of Dr Stanford's report that they rely on in support of the above contention. To the extent that that evidence relates to the hearsay evidence of certain unidentified employees covered by the Award, we refer to paragraphs 52 – 56 of our submissions dated 18 November 2019.

Response to paragraph 157 of the Unions' submission

9. The Unions contend that "the hours of work of an employee are determined by the employer" and are not dictated by an employer's clients' needs and demands. They argue that the finding proposed by Ai Group (that the hours of work of an employee engaged in the provision of disability services in a person's home are dictated by their employer's clients' needs and demands[3]) "ignores the

[2] Ai Group submission dated 18 November 2019 at paragraph 11.

[3] Ai Group submission dated 18 November 2019 at paragraph 14.

intermediate factors and steps that affect the hours of work of any particular employee".

10. The Unions' submission appears to suggest that an employer has an unencumbered discretion to schedule work, shaped only by "the overall demand for the employer's services". This is clearly incorrect and disregards the evidence given, in many cases, by the Unions' witnesses.[4] The evidence clearly demonstrates that the scheduling of work is dependent upon the needs of clients; the services they need, the employee(s) that they seek those services from, the duration of those services and the timing of those services.

Response to paragraph 158 of the Unions' submission

11. The Unions argue that "the evidence fell short of establishing that [changes to the number of clients, their budgets, their choices of services, seasonal factors, holidays and medical or clinical factors] cause constant fluctuation in demand in the case of every employer, or the degree of fluctuation in demand experienced by employers".

12. The proposition that the evidence does not establish that *all* employers experience constant fluctuations in demand imposes an unrealistic evidentiary bar on respondent parties. Moreover, it is not necessary to establish as much. The fact that the factors listed above can and do cause fluctuations in demand (as has been accepted by the Unions) supports the contentions advanced by Ai Group (and other employer parties) regarding the need for sufficient flexibility under the Award. The Commission need not be satisfied that *every* employer experiences such fluctuations *all of the time*.

13. The degree of fluctuations is, to a large extent, irrelevant. The sheer existence of any such fluctuations highlights the need for employers to respond with agility and the need for the Award to enable employers to do so.

[4] Ai Group submission dated 18 November 2019 at paragraph 14 and accompanying footnote.

Response to paragraph 160 of the Unions' submission

14. At paragraph 18 of its submissions dated 18 November 2019, Ai Group submitted that the Commission should make the following finding:

> The component of the NDIS cost model attributed to 'overhead costs' is intended to cover labour costs associated with employees who are not delivering disability services (such as CEO, managers, payroll staff and HR personnel); as well as capital expenditure.

15. The Unions submit that the proposed finding misstates the evidence of Mr Farthing. We do not agree.

16. Mr Farthing gave the following evidence about the 'overhead costs' component of the NDIS funding model:

> You indicate that you have outlined the cost inputs that an employer will face. Would you accept my proposition that your analysis is incomplete and does not contain all of the cost items that an employer would face in respect of delivering the service?---I have identified the main labour and oncosts associated with it. I haven't actually gone down and broken out what would be included in overheads, but I have identified that there is an overhead margin component. What each provider does with that is obviously up to them, and it would be impractical to list every single item that a provider might use that overhead allowance for.
>
> …
>
> So just to summarise, you referred - in response to some of those questions you referred to an overhead cost which is factored into the efficient cost model, and that's on the same page there. For the Bench it's court book page number 498, the – sorry, page 10 there for you, Mr Farthing. Items 2.9, overheads. It indicates that the efficient cost model assumes a corporate overhead of 10.5 per cent of direct costs. So you referred to that a number of times when I asked you whether the model factored in any costs that I mentioned. In respect of some of those you said, "Well, the overhead cost component may take that into account." Is that an accurate summation of your evidence?---Yes.
>
> Do you know whether the overhead cost component has in fact contemplated those cost items?---No the NDIA has never been that prescriptive to providers about what the overhead can and cannot be used for.
>
> Can I put to you that the corporate overheads component of the efficient cost model is not intended to cover labour costs?---Is that a question or - - -
>
> Yes. Can I suggest to you and can I ask for your view, or do you know whether the corporate overheads component of the efficient cost model is intended to factor in any labour costs?---Well, it would be intended to cover labour costs. Labour costs for back office staff for instance. That's what part of the overhead allowance is. Whether it's the labour costs of direct support staff is another matter, but as I said the NDIA has never been prescriptive about what a provider can and cannot use their overhead component of the unit price for.

So the overhead cost component for example would need to cover the cost of any non-front line staff. So for example it needs to cover the cost of the CEO or general manager, and it needs to cover the cost of payroll staff, HR staff, chief financial officer, any staff member that's not delivering services. Is that right?---Correct, as well as capital costs associated with running a disability service business.

Yes, the range of other corporate overheads that are not related to labour costs, absolutely. So I take it then that given your answers you'd agree with me that any overtime costs, any payroll tax, any redundancy pay, any paid compassionate leave, any paid community service leave, the cost of supply of uniforms or the payment of the uniform allowance, the payment of the laundry allowance under the award, the payment of any meal allowance, the payment of any first aid allowance, the payment of any kilometre reimbursement, having regard to what you've indicated in respect of reaching agreement to charge the client separately for that, any cost in respect of the telephone allowance under the award, any cost in respect of the heat allowance under the award, any cost in respect of the on call allowance, the additional week's annual leave for shift workers, any costs associated with rest breaks during overtime, all of those costs on your understanding would need to go into the 10 and a half per cent allocated towards corporate overheads under the model. Is that your understanding?---That is my understanding (indistinct).

Can I put to you that the corporate overheads had not been set having regard to all of those cost items?---I wouldn't know, I wasn't, you know, a member of the NDIA pricing methodology team who determined what was and wasn't going to go into the overhead.

…

So can I put the proposition to you that all of the cost items that I've taken you through, which are cost items which an employer is required to pay under either the NES or the award, your evidence and can you – ask your view as to whether this is correct or not, is it those items that I took you through that aren't - haven't been factored into the efficient cost model. If they don't – if an employer cannot absorb those into their overhead costs, which has been factored at 10.5 per cent of direct costs, if those costs can't be absorbed into the overhead cost then it will just directly eat into the assumed or the estimated 2 per cent margin. Is that right?---Yes, however, I would also point to page 12 of this document which refers to the efficient costs for level 1, level 2 and level 3 prices on various times of day, and compares it with the index based price limit which demonstrates that there is additional funds available to providers in terms of the maximum price cap once you've actually calculated these amounts.[5]

17. Mr Farthing's evidence regarding the overhead cost component of the NDIS can therefore be summarised as follows:

    (a) The NDIS does not prescribe the specific costs that may be claimed against the overhead cost component of the funding; nor does the NDIS prescribe what employers can spend that portion of the funding on.

[5] Transcript of proceedings on 15 October 2019 at PN868 – PN901.

(b) The overhead cost component is intended to take into account labour costs associated with staff who do not provide disability services and capital costs.

(c) The overhead cost component may take into account a number of labour costs in respect of staff providing disability services which are not otherwise factored into the cost model; but it has not been identified by the NDIS whether those costs are in fact accounted for through the overhead cost component.

18. The evidence cited by the Unions at paragraph 160 of their submissions is not inconsistent with the above.

Response to paragraph 161 of the Unions' submission

19. At paragraph 19 of our submissions dated 18 November 2019, Ai Group submitted that the Commission should make the following finding:

> The cost model does not expressly factor the Unaccounted Labour Costs into the setting of the component of the cost model attributed to overhead costs.

20. The 'Unaccounted Labour Costs' are listed at paragraph 17 of those submissions.

21. The Unions submit that the proposed finding is not supported by the evidence cited. As is evident from the passage of the transcript extracted above, the contention advanced is clearly supported by Mr Farthing's evidence.

Response to paragraph 162 of the Unions' submission

22. Ai Group submits that large portions of the evidence presented by the Unions should be given little weight, as set out at Attachment B to Ai Group's submission dated 18 November 2019. The Unions have not sought to grapple with these submissions in any meaningful way. They simply assert that our submission is without merit.

23. Ai Group continues to rely on the aforementioned submissions.

Response to paragraphs 164 – 173 of the Unions' submission

24. The Unions have responded to Ai Group's submissions regarding the evidence of Dr Stanford. Ai Group advances the following contentions in reply.

25. *First*, contrary to the Unions' submissions, Dr Stanford was cross examined by Ai Group regarding his research methods in respect of the qualitative research he undertook.[6]

26. *Second*, although qualitative research "is an accepted and common method of social research", the question for the Commission is the extent to which such research should be relied upon in the context of proceedings such as these. Our previous submissions about the research are made not simply because the research is qualitative in nature. They are made having regard to specific features and characteristics of the research undertaken.

27. *Third*, although Dr Stanford's evidence was not based solely on the interviews of 19 employees, his report states that it was based *primarily* on those interviews. We also note that the ASU conceded during the proceedings that it did not rely on the evidence of Dr Stanford to establish the truthfulness of what was said to him by the interviewees. These are matters that clearly and substantially undermine the weight that can be attributed to those parts of his evidence that relate to the interviews.

28. *Fourth*, a call for the production of the interview transcripts or Dr Stanford's notes from those interviews would not have addressed Ai Group's concerns. The interviewees were not called as witnesses in the proceedings. The content of their interviews with Dr Stanford therefore could not have been tested.

[6] Transcript of proceedings on 17 October 2019 at PN2223 – PN2243.

4. GENERAL FINDINGS ON THE EVIDENCE – RESPONSE TO THE EMPLOYERS' SUBMISSIONS

Response to paragraphs 12 – 13 of ABLA's submission

29. Ai Group agrees that enterprise bargaining is not "rare" or "widespread" amongst employers and employees covered by the Award; and that "in a general sense compared to other industries", it is not common.

Response to paragraph 14 of ABLA's submission

30. The finding we have advanced is intended to relate specifically to the provision of disability services.

5. THE TRAVEL TIME CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

31. The Unions characterise the basis for Ai Group's opposition to their travel time claims as being twofold; that funding arrangements do not take into account travel time and that it is difficult to calculate travel time.[7]

32. Whilst the potential for the claim to impose unrecoverable costs upon employers combined with the problematic and frankly unworkable nature of the Unions' proposed variations do constitute core elements of our opposition to the claims, this is a misleadingly narrow characterisation of our concerns. We refer the Full Bench to our full submissions in relation to the claims.[8]

Ai Group's proposed findings

33. It appears to be common ground that there is travel undertaken to, from or between clients that is, as a matter of practice, unpaid. The Unions contend that "time travelling to and from clients is time that should be paid as ordinary hours under the Award and non-payment of travel time is a contravention of the Award".[9]

34. If the Unions' submissions were an accurate articulation of the operation of the Award, there could be little justification for any variation to the instrument to deal with the issue of trave time. The matter in issue would be that of non-compliance and would be best dealt with by the Fair Work Ombudsman.

35. Regardless, we contest the Unions' interpretation of the Award-derived obligations in respect of travel time. They fail to grapple with the complexities of the matter.

36. We contend that travel that may have some connection with work that is undertaken by an employee can nonetheless occur outside the course of one's

[7] Unions' submission dated 10 February 2020 at paragraph 65.

[8] Ai Group submission dated 18 November 2019 at paragraphs 22 – 35, Ai Group submission dated 18 November 2019 at Attachment A, and Ai Group submission dated 10 February 2020 at pages 3 – 23.

[9] Unions' submission dated 10 February 2020 at paragraph 66.

employment and not attract an entitlement to payment under the Award. Travel that occurs when an employee is not working, because it occurs prior to or after performing work (be it prior to the commencement of any work that day or during a break) does not attract a payment under the current terms of the Award. There is nothing innately novel about this proposition; it is typical of the terms and conditions under which many if not most employees work across a range of sectors.

37. Whether travel constitutes work so as to attract a payment pursuant to the Award will depend upon a consideration of the specific circumstances in which such travel occurs. This will include a consideration of the contractual arrangement between the parties. It is wrong to assert, as the Unions appear to, that non-payment of travel time is a contravention of the Award in all instances.

Issues associated with measuring travel time

38. The Unions take issue with Ai Group's proposed finding that the "period of time taken to travel to a client's place of residence can vary from one occasion to the next and be difficult to predict for reasons including traffic."[10] Elsewhere in their submissions they dispute similar findings proposed by other employer parties.

39. The Unions dispute the proposed finding on two grounds; neither of which has any merit.

40. Firstly, the Unions dispute that travelling time between clients' residences is difficult to measure on the basis that "employers are able to schedule and allocate workers to perform appointments across different locations, which task must necessarily involve some assessment of the travel time required between locations."[11] Such a conclusion is a non sequitur.

41. The mere fact that employers may allocate workers to client appointments with sufficient time to permit travel to the subsequent client does not establish that employers are aware of the precise period of time such travel will take. At its

[10] Unions' submission dated 10 February 2020 at paragraph 68.

[11] Unions' submission dated 10 February 2020 at paragraph 68.

highest, it establishes that they might have a sufficient idea of how long such travel could take to allow enough time for such travel to occur. Of course, the mere fact that employees may be rostered in a certain way does not establish that such rostering is necessarily accurate or that variables such as traffic do not cause delays. There is some evidence to suggest that employees do not attend client appointments 'on time' due to variable travel times.[12]

42. Ultimately, the Full Bench could not reject the proposition that, at least in some instances, there are variables that are both unknown to an employer and beyond their control, that impact upon the time an employee travels between clients' locations.

43. The practical difficulties with estimating (and accordingly costing) and measuring time taken travelling to, from and between clients have been exhaustively ventilated in the context of both written submissions and days of conferencing before the Commission. It is accordingly baffling that the Unions submissions make no attempt to explain how an employer can measure or assess time taken to travel between clients given they appear to be consistently asserting that there are no such difficulties.

44. The second basis for the Unions' opposition to our proposed finding is that "where travel to and between particular locations is carried our regularly, the Commission would think employers would have a very good idea of those travel times."

45. The submission cannot be accepted. Ai Group acknowledges that there might be some scenarios where travel times can be estimated with a degree of certainty. However, it cannot be said that this is the case in all instances. The evidence does not establish that all travel undertaken in the sector is undertaken on a regular basis.

46. Moreover, the Full Bench could not be satisfied that it is appropriate to vary the Award to require payment on the basis of an employer's "very good idea" of the

[12] Transcript of proceedings on 15 October 2019 at PN459 – PN460.

relevant travel time. It is not appropriate that the Award require minimum entitlements to be calculated by reference to an employer's 'best guess'.

47. The Unions' submission also completely fails to account for complexities such as an employee not travelling directly to, from or between clients where such travel occurs outside of the course of their employment. These difficulties have also been the subject of our previous submissions.

48. The Unions submit, in effect, that the evidence of a small number of ABLA's witnesses indicating that they already pay travel time indicates that "in the era of 'Google Maps' the calculation of travel time is both possible and commonplace." [13] Ai Group as already addressed the evidence of such employers in our previous submissions. We accordingly here make only the following two points:

    (a) The cited evidence does not establish that payment for travel time is "common place"; and

    (b) There is no evidence before the Commission about the accuracy of 'Google Maps' and the mere fact that some employers might be happy to pay by reference to it certainly does not establish that it is an appropriate mechanism to underpin the operation of the Award.

49. The Unions concede that employees may make some use of time between engagements but complain that a proportion of that time is either lost or of much less utility or value to the employee because of a requirement to attend a further part of a shift.[14]

50. The relevant point in the context of the travel time claims is that if employees do not travel directly and immediately between consecutive clients, it renders it impossible to assess how long an employee would have spent travelling had they undertaken such travel directly and immediately.

[13] Unions' submission dated 10 February 2020 at paragraph 55.

[14] Unions' submission dated 10 February 2020 at paragraph 70.

6. THE BROKEN SHIFT CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

Response to paragraph 208 of the Unions' submission

51. The Unions submit that a client cancellation "cannot cause a broken shift in the context of broken shifts". We assume the Unions intended to submit that a client cancellation cannot cause a broken shift in the context of *employees performing disability services work*.

52. Subject to an employer making a change to the roster of an employee performing disability services work due to a client cancellation with seven days' notice[15]; we agree that a client cancellation in the context of disability services work cannot cause a broken shift.

Response to paragraph 209 of the Unions' submission

53. We refer to our submissions above in response to the Unions' travel time claims.

Response to paragraph 210 and 222 of the Unions' submission

54. Ai Group responds as follows to paragraph 222 of the Unions' submissions.

55. *First*, Ai Group does not accept the HSU's characterisation of employers "attempt[ing] to shift the uncertainty and risk associated with fluctuations in demand and revenue, associated with the changes to funding arrangements, onto their employees" through the implementation of various work practices including broken shifts.

56. The Award permits the performance of broken shifts. The evidence demonstrates that employers are utilising that flexibility in a manner that correlates with the needs and preferences of their clients and the resulting operational needs of employers. The evidence does not establish that this is done *for the purposes of* shifting any "risk and uncertainty" associated with fluctuations in demand and revenue onto employees.

[15] Clause 25.5(d)(i) of the Award.

57. *Second*, the proposed finding that broken shifts *reduce* the hourly wage over the course of the working day should not be accepted. Unpaid time during the breaks do not reduce the wages of employees. It may of course be said that if employees were paid for this time, their wages would be higher; but this assumes that all other variables remain constant. That is, for example, that an employer will respond to being subject to potentially unrecoverable costs by simply carrying on with current work arrangements. This is an unrealistic and naïve approach.

58. *Third,* the HSU submits that disability support workers may work 1 – 5 separate shifts in the course of a day. On our assessment of the evidence, it is apparent that employees may work up to six portions of a broken shift in a given day.[16]

59. *Fourth*, whilst it is trite to observe that the Award *permits* the breaking of shifts, we do not agree that the Award *incentivises* the breaking of shifts. The Award merely reflects the operational needs of employers covered by the Award and the manner in which services are provided to their clients.

60. *Fifth,* the evidence does not establish that time between broken shifts *typically* occurs at "sub-optimal locations and times of the day" or that a *significant portion* of "the down time is either lost to the employee due to the need to travel, or of less utility and value to the employee".

61. Although the evidence demonstrates that there are instances in which the break between shifts will be spent in transit or with a short window of time that does not enable an employee to productively undertake another activity, the evidence does not establish that this is *typical* or that such time reflects a *significant portion* of time between portions of a broken shift. In our submission, the evidence establishes that employees often undertake non-work related activities during a break in a broken shift, including spending time at home.[17]

[16] Ai Group submission dated 18 November 2019 at paragraphs 26(b) and 26(e).

[17] Ai Group submission dated 18 November 2019 at paragraph 34.

Response to paragraph 223 of the Unions' submission

62. The Unions submit that it is not their intention that full-time employees be prohibited from performing broken shifts. Ai Group's submissions of 13 July 2019 at paragraphs 275 – 279 are therefore no longer relevant.

63. The Unions' position as to the application of the proposed limitation that there be only one break in a broken shift to full-time and casual employees remains unclear.

Response to paragraphs 229 – 231 of the Unions' submission

64. We do not agree with the Unions' submission that the casual loading "does not include a component for irregular hours of work"; for the following reasons.

65. *First*, the terms of clause 10.4(b) cannot be relied upon to argue that the casual loading payable under the Award compensates casual employees only in respect of leave entitlements otherwise afforded to full-time employees.

66. Clause 10.4(b) states: (emphasis added)

> **(b)** A casual employee will be paid per hour calculated at the rate of 1/38th of the weekly rate appropriate to the employee's classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements accrued by full-time employees.

67. The clause states that the casual loading is to be paid *instead of* paid leave entitlements afforded to full-time employees. It does *not* say that the casual loading is payable *for the purposes of compensating employees* in respect of leave entitlements only; or indeed for any other term or condition.

68. *Second*, and as a result of the above, regard must be had to the relevant decisions of the Commission's predecessors regarding the matters compensated by the casual loading.

69. As outlined by the Unions, during the Part 10A Award Modernisation process, the AIRC relied upon an earlier decision concerning the *Metals, Engineering and Associated Industries Award, 1998 – Part 1* (**Metals Award**). That decision

makes express that the itinerance of casual work was factored into the derivation of the casual loading. 'Itinerance' was described as follows:

> … itinerance is associated with the notions of intermittent work, or lost time. Both may be portrayed as consequential to hourly hire, and to the employment by the hour incident of casual employment[18]

70. The casual loading prescribed by the Award compensates employees for intermittent work and lost time. The Award should not be varied to include an additional loading that further compensates casual employees in respect of the same.

[18] *Re Metal, Engineering & Associated Industries Award 1998, Part 1* (2000) 110 IR 247 at [187].

7. THE MINIMUM ENGAGEMENT CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

Response to paragraphs 35 and 46(a) of the Unions' submission

71. The Unions submit that the remuneration from short shifts "would not justify the time and cost required for the worker to attend" a shift that is 15 or 30 minutes in length. Reference is also made to the need to ensure that a shift is "viable" from an employee's perspective.

72. In our submission, this proposition will not always hold true. The time and cost associated with attending a shift will depend on the circumstances. For instance, the evidence demonstrates that some employees travel as little as five minutes to reach a client's home[19] and that they spend time in between portions of a broken shift for non-work-related purposes[20]. In other circumstances, an employer may arrange an employee's engagements such that they are required to perform a sequence of short shifts in quick succession.

73. Accordingly, it cannot be assumed that the time and cost associated with the performance of short engagements will necessarily be disproportionate to the period of the engagement or that the latter will not justify the former.

74. The balance that is to be struck by the imposition of minimum engagement periods must also be remembered. We refer to paragraphs 169 – 173 and 195 of our submission dated 13 July 2019 in this regard.

Response to paragraphs 40 – 42 of the Unions' submission

75. The Unions oppose the proposition that short shifts are "an inevitable consequence of the shortness of client services". They point to an overall demand for services, which they submit is increasing. They also argue that the proposition "ignores the choices made by employers about the length of the services that they offer".

[19] Ai Group submission dated 18 November 2019 at paragraph 30.

[20] Ai Group submission dated 18 November 2019 at paragraph 34.

76. It is unclear what *choices* the Unions are referring to, in the context of the provision of disability services. The material before the Commission demonstrates that the nature, extent and timing of disability services provided by an employer are contingent upon the needs of their clients. Employers do not *choose* how and when work is scheduled.

77. To the extent that Unions are referring to the choice of *providing* the relevant service, this goes to the heart of a concern voiced by Ai Group in these proceedings about increased employment costs under the Award having a bearing on the extent to which employers provide certain services to persons with a disability.

78. The Unions' rely on there being an increased demand for services. This cannot be said to necessarily correlate with increased shift lengths. As demonstrated by the evidence, demand for disability services is particularly high at certain times of the day.[21] An increase in demand for concurrent services will not necessarily enable employers to roster longer engagements. It may instead simply result in additional employees being engaged simultaneously.

79. More generally, the extent to which additional clients' services can be scheduled such that employees are afforded longer shift lengths will again depend on the needs of those clients. It cannot be assumed that increased demand will enable employers to productively engage employees for three hours at a time.

80. The assertion that "employers would try harder" to "bundle services" if the Award prescribes a three hour minimum engagement period is without foundation and again ignores the realities of the disability services sector.

Response to paragraph 46(b) of the Unions' submission

81. The Unions submit that a three hour minimum engagement period will "promote the efficient performance of work". This assertion is without foundation. No basis for it has been articulated.

[21] Ai Group submission dated 18 November 2019 at paragraph 7.

Response to paragraph 46(c) of the Unions' submission

82. The Unions submit that a three hour minimum engagement period will "contribute to the attraction and retention of skilled workers in the industry". The Unions have not identified any evidence in support of this proposition; nor is there, in our submission, any evidence before the Full Bench that establishes that proposition.

Response to paragraph 225 of the Unions' submission

83. The Unions submit that in respect of part-time employees, they "can see little basis for a provision any less than" the minimum engagement period applying to casual employees.

84. We refer to paragraphs 168 and 174 – 178 of our submission dated 13 July 2019 in this regard.

Response to paragraph 226 of the Unions' submission

85. The Unions submit that a "2 hour minimum engagement is unlikely to prevent the risk foreshadowed in the *Part-time and Casuals Case*, that work arrangements will be exploitative, being realised".

86. The relevant portion of the decision referenced by the Unions is as follows:

> **[406]** There was some evidence of short shifts being worked in a manner which verged on being exploitative. For example, in the disability sector, Ms Potoi referred to working 1½ hour shifts in the disability sector as a part-time employee in circumstances where the travel required to perform the shift took the same amount of time again; Mr Quinn worked shifts varying in length from 4 hours to 30 minutes; and Mr Morgan worked whatever shifts were offered in order to preserve his job security. However while the evidence might call for the review of minimum engagement periods in some particular awards, it did not go so far as to demonstrate that any daily engagement of a casual or part-time employee below 4 hours was necessarily unfair and exploitative, which is what we think would be needed to justify the establishment of a 4 hour minimum engagement standard across all awards. …[22]

[22] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [406].

87. The decision refers to *some* evidence of short shifts being worked in a manner which *verged* on being exploitative. With the exception of the evidence of Mr Quinn, it is not clear from the face of the decision whether that evidence related to the Award.

88. Importantly, the Full Bench recognised that the evidence did not "go so far as to demonstrate that any daily minimum engagement of a casual or part-time employee below 4 hours was necessarily unfair and exploitative". That is, the Commission did not conclude that a minimum engagement period of, for example, two hours, would enable "exploitative" work practices or that it would be unfair.

89. Our position in respect of the introduction of a two hour minimum engagement period remains as per paragraphs 138 – 143 of our submission dated 10 February 2020 and to that extent, we oppose the proposition that a two hour minimum engagement should be considered only if that minima applies "to any period of engagement within a broken shift".

8. THE MINIMUM ENGAGEMENT CLAIMS – RESPONSE TO THE EMPLOYERS' SUBMISSIONS

Response to ABLA's response to question 33 of the Background Paper

90. ABLA submits that it is not opposed to the introduction of minimum engagements for part-time employees consistent with the existing minimum engagement periods for casual employees, provided that attendances for the purposes of staff meetings and training/professional development are subject to a minimum engagement of one hour.

91. For the reasons stated at paragraphs 154 – 201 of our submission dated 13 July 2019 and paragraphs 138 – 143 of our submission dated 10 February 2020, we oppose ABLA's submissions.

9. THE REMOTE RESPONSE / RECALL TO WORK CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

92. Ai Group has dealt with the remote response claim and the ASU's proposal in detail at paragraphs 63 - 153 of our submission dated 18 November 2019. The below submissions are in response to issues raised by the Unions at paragraphs 72 - 98 of their 10 February 2020 submission.

93. It is asserted on behalf of the ASU that their proposed variation is only intended to apply in the context of an employee who is recalled to work overtime. We welcome this clarification.

94. In our view, the proposed wording does not make this sufficiently clear. Even with the benefit of having had lengthy discussions with the Unions about the issues at hand in the context of the conferencing process, we had not read or understood their proposed variation to be so confined.

95. Relevantly, clause 28.4 deals with an employee being requested to attend a workplace in circumstances where the employee is "recalled to work overtime" and provides that an employee is paid at the "appropriate overtime rate". In contrast, proposed clauses 28.4(b) and 28.4(c) omit any reference to an employee being required to "work overtime". We had understood the varied approach within the subclauses to be intended and significant. Indeed, given the absence of such a reference, we had interpreted the provision to require payment at overtime rates when an employee is contacted to perform work whilst away from the workplace.

96. If the Commission were moved to vary the Award to provide for an obligation as proposed by the ASU, the drafting should be clarified.

97. The Unions' submissions also indicate that the ASU's proposed variation, "does not interfere with any other term of the [A]ward."[23]

[23] Unions' submission dated 10 February 2020 at paragraph 75.

98. We take it that this means that the intent of the proposed determination is that it will sit within the context of the current terms of clause 28.1(b)(iii), which provides that:

> Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).

99. Clause 28.1(b)(ii) relevantly prescribes that the time worked after 10 hours per day will attract overtime rates. Clause 28.1(b)(i) requires that hours worked in excess of 38 per week or 76 per fortnight will attract overtime rates.

100. Although the ASU may not intend for the proposed variation to interact with other Award clauses, there is an inevitable level interaction between this proposal and the HSU's proposals to restrict a part-time or casual employee's capacity to work more than 8 ordinary hours per day or, in the context of part-time employees, to work more than their agreed ordinary hours. Put simply, the combined operation of both variations would, if granted, magnify the negative impact upon employers that each claim would have separately.

101. The granting of the HSU's claims mentioned above would extend the circumstances in which the ASU's proposed variation would apply. This could impose not insignificant restrictions and costs upon employers.

102. Unless the ASU is proposing that the clause it has advanced only operate in the context of time which is currently overtime hours under the Award, the granting of either of the HSU proposed variations (or a variant thereof) would be a factor that should weigh against the ASU's claim.

103. Individual variations proposed to the Award should not be considered in isolation. Their combined and cumulative impact must be considered. The example of the HSU and ASU claims provide a particularly clear demonstration of the need for this approach, but it is a matter that arises in the context of all of the Unions' claims.

104. In the context of the considerations identified at s.134 and the raft of claims being pressed in these proceedings, we observe that an assessment of fairness from an employer's perspective weighs against expecting employers to accommodate an excessive degree of costly or restrictive changes to the Award. The requirement in s.134(1)(g) to take into account "the need to ensure a …stable and sustainable award system" moderates the extent to which the Commission should be moved to implement sweeping changes to the Award as part of the current review.

105. Now that it has been clarified that the ASU's proposed clause only relates to overtime, we observe that there is arguably less force to the proposition that a minimum payment of two hours is required, in the context of an employee not being "on call". There is no requirement under the Award for an employee to perform any amount of overtime. Unlike many awards, it does not contain a clause dictating that employees work "reasonable overtime". Accordingly, under the safety net an employee is free to simply refuse any request to work overtime. They are able to turn off their phone or not check their emails.

106. The Unions justify the proposed 2 hour minimum payment on the basis that it "aligns with the minimum payment for a recall to work overtime at a physical workplace"[24]. However, it is unclear why such alignment is necessary. Obviously, a greater imposition and cost is likely visited upon an employee who is required to return to a specific physical location when compared to circumstances in which an employee is requested to deal with a matter from their home.

107. Moreover, when an employee is working overtime, they are receiving an inflated rate that already compensates them, to some degree, for the disutility of such work. This further limits the justification for a two hour minimum payment.

[24] The Unions' submission dated 10 February 2020 at paragraph 87.

Section 134(1) of the Act

108. We observe, at the very least, that a minimum payment obligation can only serve to increase employer costs. Accordingly, a consideration of s.134(1)(f) weighs against the claim.

109. It is also foreseeable that it would be contrary to the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)), to the extent that it creates a limitation on the extent to which employers may seek assistance from particular employees outside their ordinary hours even if such employees are best placed to assist in the efficient resolution of an issue.

110. Section 134(1)(g) also weighs against the granting the claim, for the reason cited above.

The Unions' submissions regarding ABLA's proposed clause

111. The Unions have advanced various submissions regarding ABLA's proposed clause and Ai Group's alleged misunderstanding of the scope of that claim. In so doing they also respond to various submissions made by Ai Group.

112. We anticipate that ABLA will clarify the intended operation of their claim. We simply observe that our reading of the provision is based on the text of the provision and extensive involvement in the framing of such provisions through the conciliation process conducted by the Commission.

113. In our view, the Unions mischaracterise ABLA's claim by describing it as providing "for a scheme whereby an employee could be required by their employer to work both ordinary hours and overtime away from their workplace."[25] The proposed scheme does not afford an employer any additional right to "require" an employee to work in this manner beyond what is currently permissible under the current terms of the Award.

[25] Unions submissions dated 10 February 2020 at paragraph 76.

114. On its face, the proposed clause merely seeks to deal with payment for remote response work and associated record keeping requirements. It does not alter the status of such hours as either ordinary hours or overtime. Nor does it permit an employer to require employees to work additional hours, as alleged by the Unions. It simply does not deal with when an employee may be required to work.

115. The Unions contend that ordinary hours worked under ABLA's draft determination "would not be arranged in the manner provided by clause 25.1(a); would not be rostered according to clause 25.5; and would not form part of a part-time employee's agreed hours regular pattern of work." [26] These characterisations are not necessarily accurate or, in any event, problematic. We deal with the three issues separately below.

116. In relation to the operation of clause 25.1(a), we simply observe that whether the working of such hours conforms with this provision will depend upon the specific circumstances. It may be that the remote response work is undertaken within the arrangement of ordinary hours contemplated by 25.1(a). Further, the operation of clause 28.1(b)(iii) may address the issue of whether any hours worked outside of such arrangements constitute overtime hours. Regardless, if the hours are not ordinary hours, they will simply need to be paid "at the appropriate rate", which may be the relevant overtime rate.

117. In relation to the assertion regarding such work not being rostered according to clause 25.5, we note that the Unions appear to overlook the fact that clause 25.5 does not apply to casual employees[27], or in the context of an employee working mutually agreed additional hours (subject to some limitations)[28] and provides a capacity to change the roster without advanced notice in certain circumstances (including by phone and email).

[26] Unions' submission dated 10 February 2020 at paragraph 77.

[27] Clause 25.5(c) of the Award.

[28] Clause 25.5(d)(iii) of the Award.

118. In relation to the Unions' contention that the relevant work "would not form part of a part-time employee's agreed regular patter of work", we simply observe that the Unions do not say why this is problematic.

119. The proposed clause does not permit employers to contravene s.63 of the Act, as alleged by the Unions. It is not apparent why the Unions contend that it would.

120. The Unions contend that the "minimum engagement periods that apply to casual employees" would not apply in the circumstances where the remote response provisions apply.[29] We agree. We also observe that the Award does not prescribe minimum engagements for casuals. It sets minimum payments. In our view, the more specific provisions of the remote response clause would and should apply to the exclusion of such provisions. Putting aside issues of construction, we contend that this is appropriate as a matter of merit. Without repeating the detail of our previous submission regarding the proposed clause, we observe that ABLA's proposed clause provides a more nuanced and balanced approach to regulating such matters than the simplistic imposition of minimum payments for casual employees in all work contexts.

Ai Group's alleged misunderstanding of ABLA's claim

121. The Unions assert that "clause 28 only regulates recall to work overtime. It does not concern an employee's ordinary hours of work"[30].

122. Despite this submission, there is nothing in the words of either clause 28.4(b) or 28.4(c) that expressly contemplates a "recall" to work overtime. Unlike clause 28.4(a), the provisions are not clearly limited to circumstances where there has been some break between the working of ordinary hours and the commencement of overtime.

123. A difficulty that flows from this is that clauses 28.4(b) and 28.4(c) might be said to apply in circumstances where an employee may be required to perform work away from the workplace during ordinary hours but continue such work into hours

[29] Unions' submission dated 10 February 2020 at paragraph 79.

[30] Unions' submission dated 10 February 2020 at paragraph 78.

that become overtime. Accordingly, in such circumstances an employee would be entitled to a minimum of either one or two hours pay at overtime rates even though the bulk of the work performed away from the workplace may have been undertaken during ordinary hours.

124. The Unions contend that all employees recalled to work overtime are currently entitled to a minimum engagement of 2 hours of work.[31] If the Unions are contending that employees who currently work overtime without being recalled to the employer's or client's premises are entitled to such a minimum entitlement, we dispute this.

Record-keeping

125. The Unions dispute that any record keeping clause is necessary.[32] Their only arguments in support of the position is that there are other situations in which an employee cannot be directly supervised and that "employers can simply adapt existing administrative procedures to the new term".

126. It cannot be assumed that the current provisions are operating without issue. This is not established in the evidence. Moreover, the Unions do not identify or refer to any evidence establishing what the existing procedures are, or that they can be applied in the context of the proposed term. The Commission should include a record keeping clause as previously proposed.

The evidence relied upon by the Unions

127. The Unions submissions respond to Ai Group's previous submissions relating to the evidence in support of the claim.[33] Ai Group dealt with the evidence at paragraphs 102 - 111 of our submission dated 18 November 2019.

[31] Unions' submission dated 10 February 2020 at paragraph 84.

[32] Unions' submission dated 10 February 2020 at paragraph 88.

[33] Unions' submission dated 10 February 2020 at paragraphs 90 – 98.

128. The Unions indicated that Ms Anderson's evidence was that "there was an expectation she would be available to respond to calls from management".[34] We understand her evidence in this context to be about taking calls outside of ordinary hours of work and, to the extent that answering such calls constitute work, in overtime hours[35]. They also acknowledge that under cross-examination, she clarified that her employer did not require or request her to perform work outside of her ordinary hours unless she was rostered to be on call.

129. The Unions now contend that Ms Anderson's circumstances would not attract a payment under proposed clauses (b) or (c).[36] We confess to being uncertain as to the basis for this submission.

130. In our view, the submission serves to highlight the confusing nature of the proposed clause. It appears to us that, on one reading of the clause, receiving a telephone call from your employer would be the very type of circumstance that attracts a payment under clause 28.3(b), although this is far from clear. Hence, we have previously queried whether it is receiving the call that triggers an entitlement or the performance of work in response to it.

131. Regardless, if Ms Anderson would not receive an entitlement under the proposed clause, the relevance of her evidence to the claim is undermined.

132. The Unions point to the lack of evidence to substantiate our assertion that Ms Anderson works for the largest provider of disability services in Australia.[37] Notwithstanding the point that is taken about the absence of evidence, we submit that we understand that the employer is well-known to at least some of the Unions and in that context doubt that the Unions would genuinely dispute this proposition, or at the very least the proposition that Life Without Barriers is a very large employer in the sector. Regardless, the evidence advanced by the Unions,

[34] Unions' submission dated 10 February 2020 at paragraph 92.

[35] Ms Anderson is a full time employee.

[36] Unions' submission dated 10 February 2020 at paragraph 93.

[37] Unions' submission dated 10 February 2020 at paragraph 96.

as the proponents of the claim, does not establish that Ms Anderson's circumstances are indicative of employees in the sector more broadly.

133. The Unions criticise Ai Group for not cross-examining Ms Flett about whether her employment is "unrepresentative of the sector"[38]. The criticism is without merit. There would be no utility in a single lay witness proffering opinion evidence as to whether her employment or work was representative of the sector. In any event, if the Unions assert that it is representative of the sector, they should have established an evidentiary basis for this, but they have not. Ms Flett's experiences cannot be assumed to be representative of employees in the sector more broadly.

134. The Unions contest our contention that the evidence relied upon by the ASU is insufficient to justify the grant of the claims.[39] We maintain our view that it cannot be that the evidence of two lay witnesses provides a sound basis for the proposed variations. The claim proposed by the ASU is significant and its industrial merit is clearly contestable. It will potentially have a very negative impact upon employers.

135. The Unions also now point to the evidence of Dr Muurlink and Dr Stanford as supporting the claim, but they do not explain the relevance of such evidence to this particular claim or indeed cite any specific element of the evidence.

[38] Unions' submission dated 10 February 2020 at paragraph 97.

[39] Unions' submission dated 10 February 2020 at paragraph 98.

10. THE OVERTIME CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

Response to paragraphs 15 – 17 of the Unions' submission

136. The Unions have responded to AFEI's submission that there are employees who work on a part-time basis because it suits them. The Unions take issue with AFEI's characterisation of the evidence cited and point to data suggesting some underemployment, but do not go so far as to challenge the finding sought by AFEI.

137. We note in this regard that although some witnesses engaged on a part-time basis indicated that they wished to work additional hours, the evidence does not demonstrate that part-time employees do not wish to be engaged on a part-time basis and / or that they wish to be engaged as full-time employees.

11. THE CLOTHING AND EQUIPMENT CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

Response to paragraph 236 of the Unions' submission

138. The Unions contest ABLA's characterisation of Mr Elrick's evidence; set out at paragraphs 143(a) and (b) of the Background Paper.

139. Mr Elrick's evidence appears to be hearsay evidence and to the extent that it is, he has not identified the employees or employers to whom he refers. His evidence therefore could not properly be tested. Accordingly, the evidence should be afforded very little if any weight.

Response to paragraphs 237 – 241 of the Unions' submission

140. The Unions contest ABLA's characterisation of the evidence of Ms Wilcock and Ms Waddell; set out at paragraphs [143] – [146] of the Background Paper. They submit that ABLA's characterisation of the evidence is inaccurate because "personal protective equipment is not practically available to employees, as employees have to pick these up in their own time, and cover the costs of travel themselves, if they wish to use such equipment".

141. Ai Group's proposed finding[40], which relies on the same evidence in support of its submissions in opposition to the HSU's clothing and equipment claims, is also contested by the Unions.

142. The Unions submissions, and its cross examination of Mr Wright (CEO of Hammond Care)[41], appears to proceed on the erroneous assumption that in order to access the relevant equipment, employees would need to travel to the employer's head office at the commencement of each day or shift.

143. Ms Waddell's evidence was that "head office is *usually* in the opposite direction" of her clients (our emphasis). It was not her evidence that head office is *always* in the opposite direction. It would obviously be available to Ms Waddell (and other

[40] Ai Group submission dated 18 November 2019 at paragraph 42 and Ai Group submission dated 13 July 2019 at paragraph 527.

[41] Transcript of proceedings on 17 October 2019 at PN2580 – PN2581.

employees) to visit head office to obtain the relevant equipment from time to time when doing so does not require the employee to undertake unreasonable additional travel; and to obtain sufficient quantities of the equipment such that they do not routinely have to visit head office. In some circumstances, employees may be able to do so when they are required to attend the office for some other reason, such as attending meetings.

144. The apparent impracticalities described by the Unions in some circumstances may never arise and in the context of Ms Waddell, is overstated.

Response to paragraph 242 of the Unions' submission

145. The Unions submit that they would not oppose the introduction of a clause similar to clause 32.2(d) of the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award Clause**), subject to the application of subclause (ii) not being contingent upon an employer's negligence. The Unions submit that "the fact that loss is suffered in the course of the employment should be sufficient to ground an entitlement to reimbursement".

146. The Manufacturing Award Clause is in the following terms:

> **(d) Damage to clothing, spectacles, hearing aids and tools**
>
> **(i)** Compensation must be made by an employer to an employee to the extent of the damage sustained where, in the course of work, clothing, spectacles, hearing aids or tools of trade are damaged or destroyed by fire or molten metal or through the use of corrosive substances. The employer's liability in respect of tools is limited to the tools of trade which are ordinarily required for the performance of the employee's duties. Compensation is not payable if an employee is entitled to workers compensation in respect of the damage.
>
> **(ii)** Where an employee as a result of performing any duty required by the employer, and as a result of negligence of the employer, suffers any damage to or soiling of clothing or other personal equipment, including spectacles and hearing aids, the employer is liable for the replacement, repair or cleaning of such clothing or personal equipment including spectacles and hearing aids.

147. Ai Group opposes the insertion of a clause similar to the Manufacturing Award Clause and the Unions' submissions in this regard.

148. The material before the Commission does not establish that such a provision is necessary to ensure that the Award achieves the modern awards objective. The material in these proceedings has concerned the provision of uniforms and employees' clothing. The material before the Commission does not establish:

(a) The extent to which employees' spectacles, hearing aids or tools of trade are damaged or destroyed in the course of their duties (if at all);

(b) What 'tools of trade' are used by employees in the course of their duties;

(c) If and where such damage occurs, the cause of that damage;

(d) The extent to which employees' clothing or other personal equipment suffers from damage or soiling as a result of their employer's negligence (if at all); and

(e) The circumstances in which employees' personal equipment suffers from damage or soiling for reasons other than their employer's negligence (if at all).

149. In addition, we note that:

(a) The Manufacturing Award Clause does not require an employee to provide proof of the damage, destruction or soiling; or absolve an employer from their liability to reimburse an employee where such proof is not forthcoming.

(b) The scope of the clause is broad. It applies wherever there is any damage or soiling, even if the extent of the damage or soiling does not necessitate or warrant the replacement of the clothing or other item (for example, because it can be cleaned).

(c) The clause renders an employer "liable" for the replacement, repair or cleaning of clothing or personal equipment. Whilst not abundantly clear, the provision appears intended to entitle an employee to the replacement, repair or cleaning of clothing or personal effects that they have elected to wear during the course of their employment, irrespective of their value. Accordingly, the proposed clause appears to create an Award-derived

obligation for potentially expensive items, even though they were not essential for the purposes of enabling the employee to undertake their work (e.g. designer brand glasses).

(d) The clause would appear to apply even where an employee elects not to use equipment, clothing or protective effects provided by an employer for the very purpose of ensuring that an employee's clothing and equipment are protected from damage and/or soiling.

(e) The clause would require the payment of amounts that are not funded by the NDIS.

150. For all of the reasons stated above, the provision would operate very unfairly to employers and should not be adopted.

151. Finally, the Unions' proposition that subclause (ii) of the Manufacturing Award Clause ought to operate wherever "such loss is suffered", even if it is not as a consequence of the employer's negligence, should not be accepted. We note that this is a significant deviation from the HSU's proposed clause 20.3(ii), which expressly states that its proposed damaged clothing allowance would not be payable "where the damage or soiling is caused by the negligence of the employee"[42].

152. The position now advanced by the Unions would clearly result in an unjustifiable and unfair windfall gain for employees where the damage or loss is a consequence of an ***employee's*** negligence or carelessness. The imposition of such additional costs on employers is clearly unfair and unjustifiable.

Response to paragraph 244 of the Unions' submission

153. The Unions submit, in response to ABLA's characterisation of the evidence, that the fact that "disputes regarding the clause could be dealt with via the dispute resolution procedure in the Award does not negate the need for a definition of the term ***'adequate'*** within the clause".

[42] Page 2836.

154. We disagree. The dispute settlement procedure provides an appropriate mechanism through which an employee's concern about the adequacy of the number of uniforms provided can be ventilated. As a result of that mechanism (amongst the many other reasons previously advanced by Ai Group), it is not *necessary*, in the relevant sense, for the Award to prescribe the number of uniforms to be provided to an employee. Further, as has been accepted by the Unions, employee concerns about inadequate uniforms are on occasion dealt with and resolved at the enterprise level[43] and the UWU is not aware of any such dispute being referred to the Commission[44].

Response to paragraph 246 of the Unions' submission

155. The UWU submits that "defining the term 'adequate' in the manner proposed by the UWU would ensure that employees were provided an adequate number of uniforms from the commencement of employment". We continue to rely on our submissions of 13 July 2019 at paragraphs 491 – 519 in this regard.

[43] The Unions' submission dated 10 February 2020 at paragraph 246.

[44] The Unions' submission dated 10 February 2020 at paragraph 245.

12. THE CLOTHING AND EQUIPMENT CLAIMS – RESPONSE TO THE EMPLOYERS' SUBMISSIONS

Response to NDS' response to question 42 of the Background Paper

156. NDS submits that "if the [A]ward were to be varied to address the HSU claim in relation to clothing other than uniforms, the [Manufacturing Award Clause] could be a reasonable starting point for drafting", subject to concerns previously raised by Ai Group and AFEI regarding the HSU's clothing and equipment claims.

157. For the reasons outlined above, Ai Group disagrees with NDS' submission that the Manufacturing Award Clause provides even a "starting point".

158. Also, as mentioned by NDS, the HSU's damaged clothing claim concerns clothing and personal effects. It does not relate to equipment (as the Manufacturing Award Clause does) and accordingly, the material before the Commission does not provide any assistance to it regarding the use of and potential damage to equipment used by employees covered by the Award during the course of their employment. This is another reason why the Manufacturing Award Clause is not appropriate.

13. THE CLIENT CANCELLATION CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

Response to paragraphs 247 – 250 of the Unions' submission

159. The Unions do not appear to contest Ai Group's submissions as to how clause 25.2(f) operates. Rather, they point to alleged non-compliance with the extant clause.

160. Without accepting the accuracy of the allegations made, we note that any non-compliance with the current provision is not of itself a basis upon which the Commission should move to vary the clause. Non-compliance, or perceived non-compliance, is a matter that should be dealt with through the appropriate channels including the dispute settlement procedure contained in the Award and enforcement through Courts of competent jurisdiction.

Response to paragraph 251 of the Unions' submission

161. The Unions do not contest that client cancellations occur in both the disability and home care sectors; however, they argue that "their incidence depends on the business practices of the home care and disability providers". The Unions have not explained what business practices they are referring to or how such practices can have a bearing on the frequency of client cancellations.

Response to paragraph 264 of the Unions' submission

162. We do not agree with the Unions' submission that "there are situations where employers may receive funding from a cancellation but have no obligation to pay an employee for the cancelled shift" in the context of the NDIS.

163. It is our understanding that under the NDIS, an employer is unable to cancel a shift due to a client cancellation and claim NDIS funding where the employer is not required to pay the employee. The employer therefore cannot "benefit" in the manner described by the Unions. We refer to paragraph 154 of our submission dated 10 February 2020, in respect of UWU finding (8).

14. THE CLIENT CANCELLATION CLAIMS – RESPONSE TO THE EMPLOYERS' SUBMISSIONS

Response to amended draft determination filed by ABLA (attached to submission of 10 February 2020)

164. In response to question 61 in the Background Paper, ABLA has filed an amended draft determination. As a consequence of those amendments, the proposed clause would apply where a client cancels a shift within seven days of a scheduled service. It would not apply where a client gives more than seven days' notice. In such circumstances, 25.5(d)(i) may enable an employer to alter the employee's roster and the proposed client cancellation clause would not be enlivened.

165. The proposed clause partially addresses some of the concerns previously raised by Ai Group in opposition to ABLA's proposed claim;[45] however even in its revised form, it would impose significant new inflexibilities and costs on employers in the context of the home care sector, which should not be adopted.

[45] Ai Group submission dated 26 September 2019 at paragraphs 29(b) and 38 – 40.

15. THE MOBILE PHONE CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

Response to paragraph 267 of the Unions' submission

166. The Unions submit that "it would not be feasible for the Unions to ascertain 'the proportion of employees in the industry who are required to use mobile phones in the course of their employment'".

167. Although there may be practical difficulties associated with establishing the precise proportion of employees covered by the Award who are required to use mobile phones in the course of their employment; the Unions have not so much as attempted to demonstrate the proportion of such employees by way of, for example, a survey of a sample of employees covered by the Award. Whilst such a survey may not be able to be extrapolated to measure the relevant proportion of all employees covered by the Award, it may nonetheless have had some illustrative value.

168. In the absence of such evidence, the Commission is, respectfully, unable to reach any conclusion as to the extent to which employees covered by the Award are required to use mobile phones in the course of their employment.

169. The Unions also submit that ABLA's submission "flies in the face of the reality of the ubiquitous use of mobile telephones and smart phones in the Australian community, and as a method of communication between employers and employees".

170. The use of mobile phones (including smart phones) in the general community and as a method of communication between employers and employees cannot ground the Unions' claims. That employees (or persons generally) own mobile phones and / or use one as a means of contacting their employers in lieu of other forms of communication such as emails or landline telephones clearly does not establish the extent to which employees covered by the Award are required by their employers to use mobile phones in the course of their duties.

Response to paragraphs 268 – 269 of the Unions' submission and the Unions' response to questions 69 and 70 of the Background Paper

171. The Unions appear to accept that their evidence does not establish "the proportion of work related mobile phone usage versus non-work related use by employees".

172. The absence of such evidence is problematic because it does not enable the Commission to assess the extent of the cost imposition on employers if the Unions' claim was granted and / or whether the proposed clause is necessary to ensure that the Award achieves the modern awards objective.

173. The evidence of Ms Stewart and Ms Fleming cannot be relied upon to establish the proportion of work-related mobile phone usage by employees in the industry generally. That evidence relates only to two employees employed by one employer under the Award.

Response to paragraph 271 of the Unions' submission

174. The Unions rely on the evidence of Ms Fleming in support of the proposition that employees covered by the Award are directed or otherwise required to upgrade their phone to a smart phone.

175. Ms Fleming's statement says that she was "forced" to upgrade to a flip phone; however, this is evidence only of her perception. It is not her evidence that she was required, directed or "forced" *by her employer* to purchase a smart phone or that she attempted to ascertain from her employer whether, absent a smart phone, she could nonetheless access her rosters.

Response to paragraph 273 of the Unions' submission

176. We refer to our submissions of 10 February 2020 at paragraphs 169 – 170 in this regard.

Response to paragraph 274 of the Unions' submission and the Unions' response to question 70 of the Background Paper

177. The HSU has withdrawn its proposed mobile phone clause and instead supports the provision sought by the UWU, which is set out at paragraph [252] of the Background Paper.

178. The many arguments previously advanced against the HSU's claim remain apposite to the Commission's consideration of the UWU's proposal. [46] Importantly, proposed clauses 20.6(a)(i) and (ii) require the employer to pay for or reimburse an employee for all costs associated with the use of a mobile phone provided by the employer. This would include personal usage and fees incurred by the employee through work-related usage of the phone that is not necessary or required by the employer.

179. We also note that:

    (a) Proposed clause 20.6(c) requires that an employer and employee reach agreement about the amount to be reimbursed to an employee. The practical difficulties arising from this are obvious. An employee could readily refuse to agree to a reasonable amount of reimbursement and instead insist on an unjustifiable amount. In the absence of agreement, the employee could invoke a dispute pursuant to the dispute settlement procedure contained in the Award. The cost and regulatory burden flowing from the proposed clause for an employer is unfair and unjustifiable.

    (b) The Unions have not established that the requirement that reimbursement under clause 20.6(c)(i) must equate to at least 50% of an employee's monthly plan is warranted. The evidence does not establish that 50% of an employee's usage of their personal phones is attributable to work purposes. The clause could quite clearly result in employers being required to reimburse employees for costs associated with personal use. This cannot be said to be a necessary part of the minimum safety net.

[46] Pages 811 – 899.

(c) The Unions have not established that the $100 limitation under clause 20.6(c)(i) on the value of the plan is appropriate. There has been no examination in these proceedings of the costs associated with mobile phone plans, the inclusions offered by telecommunication providers with plans of different values or the extent to which those inclusions are necessary for employees using their mobile phones for the purposes of their work. Put simply, the Commission cannot be satisfied that a $100 plan, which under the clause could result in an employer reimbursing $50 a month to an employee, does not reflect a cost that is excessive and out-of-step with the provision of a minimum safety net. If an employee chooses a $100 plan because, for instance, they want to access a large amount of internet data for personal purposes, an employer should not be required by the safety net to reimburse an employee for that.

(d) The clause does not require an employee to provide any evidence of the fees associated with a pre-paid mobile phone for the purposes of clause 20.6(c)(ii).

16. THE MOBILE PHONE CLAIMS – RESPONSE TO THE EMPLOYERS' SUBMISSIONS

Response to ABLA and NDS' response to question 66 in the Background Paper

180. ABLA and NDS have identified specific classes of employees, in response to question 66 of the Background Paper.

181. Ai Group maintains the position it articulated at paragraphs 169 – 170 of its submission dated 10 February 2020. The Unions have failed to propose a workable, fair or reasonable proposal that could apply to any group of employees covered by the Award, however defined or described. The claim should be dismissed.

17. THE SLEEPOVER CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

Response to paragraphs 280 – 282 of the Unions' submission

182. The Unions rebuff submissions made by ABLA regarding the absence of evidence called in support of the sleepover claim advanced by the HSU.

183. Contrary to the Unions' submissions, the assertions it has made based on the "face of the clause" should not move the Commission to make the changes it has proposed. The absence of probative and reliable evidence regarding the operation of the clause, the circumstances in which employees are required to sleepover and the existence of circumstances in which the additional requirements sought are necessary, are central to satisfying the Commission that the provisions it has proposed are *necessary* to ensure that the Award achieves the modern awards objective.

184. The Unions submit that "the question for the Commission … is whether a term making such provision establishes an appropriate fair minimum standard for the performance of the work". The Commission cannot, however, properly make that assessment in the absence of evidence about the circumstances in which the relevant work is performed; including, specifically, circumstances that warrant the additional requirements proposed.

Response to paragraphs 283 – 285 of the Unions' submission

185. The Unions submit that the provisions proposed are permitted for inclusion in the Award by s.139(1)(c); which states that a modern award may include terms about arrangements for when work is performed.

186. Clauses 25.7(c)(i) – (iv) are not about arrangements for when work is performed. They are about provisions that must be made when a certain type of work (i.e. a sleepover) is performed. This is to be contrasted to the opening sentence of clause 25.7(c) which, in our submission, is about when work is performed.

187. We continue to rely on paragraph 490 of our submission dated 13 July 2019.

18. THE VARIATION TO ROSTER CLAIMS – RESPONSE TO THE UNIONS' SUBMISSIONS

Unions' response to question 81 in the Background Paper – page 55 of the Unions' submission

188. We here respond to the submissions made by the Unions in respect of various findings proposed by ABLA.

189. It is unclear whether the references made by the Unions to "consumer directed care" relate only to the service delivery model applying in the home care sector, or whether the term is intended encompass all models of care operating within the coverage of the Award that are directed by consumer needs, including the NDIS. We respond assuming it is the latter, broader, proposition.

190. The Unions submit that the increase in working hours variability "is a result of how employers in the industry have chosen to organise their workforce, and of the high level of flexibility available for employers under the current Award". They argue that employers, including those operating under the NDIS, "continue to have control over when work is performed".

191. The Unions' submission appears to suggest that an employer has absolute control over when work is performed. This is clearly incorrect and disregards the evidence given, in many cases, by the Unions' witnesses.[47] The evidence clearly demonstrates that the scheduling of work is dependent upon the needs of clients; the services they need, the employee(s) that they seek those services from, and the duration and timing of those services.

192. The assertion that employers have *chosen* to organise their workforce in that way or that the variability in working hours is *a result of* existing flexibilities in the Award is also unfounded. Employers have responded to the client-driven nature of service provision under the NDIS. There is no evidence that employers have

[47] Ai Group submission dated 18 November 2019 at paragraph 14 and accompanying footnote.

sought to exploit extant flexibilities for illegitimate or unjustifiable reasons, in the absence of a genuine operational need.

193. Finally, the Unions submit that although rostering under the Award requires a consideration of a number of factors, they do not consider that this justifies frequent or late changes. The Unions submissions assume that the imposition of a requirement to pay overtime will alter rostering practices and eliminate frequent or late changes. There is no material in support of this proposition and as a matter of logic, in the context of consumer-directed-care and the evidence presented regarding frequent changes due to circumstances beyond an employer's control (e.g. client cancellations and employee absences), it cannot be accepted.

Response to paragraph 290 of the Unions' submission

194. The Unions do not oppose the findings sought by Ai Group but submit that the grant of the claim "will act as a financial incentive for employers to roster effectively, and to adopt a model of service provision that does not rely on regular late changes to employee rosters".

195. The evidence in these proceedings does not reveal any widespread or systemic problem of employers not rostering "effectively" or without regard for the impact of roster changes on their employees. Further, it is not fair that employers are required to remunerate employees at a higher rate where roster changes occur due to reasons outside the employer's control (e.g. changes by a client or the absence of other employees).

196. It is not clear what type of service provision model the Unions are referring to in their aforementioned submission, particularly in the context of the NDIS. Nor is it evident that employers have adopted a model of service provision that relies on regular late changes to rosters.

197. If the Unions are seeking to assert that employers ought to adopt a service provision model that enables employers to charge a fee to their clients for cancellations or imposing minimum notice periods on their clients; there is no evidence of employers generally being able to implement such service agreements across the board.

19. THE ASU'S REVISED COMMUNITY LANGUAGES CLAIM

198. Ai Group has advanced detailed submissions in opposition to the ASU's previous community languages claim.[48] The union has since filed an amended claim and submissions in support of it. We make the following submissions in opposition.

199. *First*, a strikingly unfair aspect of the proposed new clause is that its application is not limited to circumstances where an employee uses their secondary language skills *at the direction of their employer*. Given the multicultural nature of Australian society, many employers now engage employees who happen to possess secondary language skills. It is likely the case that in some instances such employees may, by virtue of coincidence rather than design or intent, be required to work with clients who speak the same other language.

200. *Second*, the claim does not limit the application of the clause to circumstances where the use of the secondary language adds value to the work of the employee.

201. Without in any way calling for the introduction of the a new allowance of the nature proposed, Ai Group submits that, if a claim for a new allowance were to be entertained, any resulting clause should be limited in its application to circumstances where an employer has expressly requested or required an employee to use the relevant skills. This will mitigate the adverse effect on some employers by enabling them to manage or control their exposure to such a claim. It will also reduce the prospect of the employee receiving an additional payment under the safety net in circumstances where there is no real increase in the value of their work flowing from their exercise of relevant language skills.

202. *Third*, there is no requirement that employees possess any particular level of competence in their use of the secondary language. The Award should not require payment simply because an employee exercises some rudimentary skills in a particular language other than English. This would be unfair to their employer. Any provision of the nature proposed by the ASU should stipulate an

[48] Ai Group submission dated 8 April 2019 at pages 104 – 125.

objective measure of proficiency which must be passed in order for the allowance to be payable.

203. *Fourth*, it is unclear what justification there is for the particular quantum of allowance proposed. This is entirely unsatisfactory given that the ASU has proposed a not insubstantial quantum.

204. *Fifth*, it is unclear whether an employee is only to receive the allowance in the week that they use the skill or whether it is payable on a regular or ongoing basis. It would be obviously unfair for an employer to be required to pay an allowance on an ongoing basis for only occasional use.